



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT KISII
Criminal Appeal 9 of 2009**

CHRISTINE NCHAGWA CHACHA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being from original conviction and sentence by the Resident Magistrate's Court

at Kehancha Criminal case no.126 of 20068 by J.R.Ndururi (RM))

JUDGMENT

The appellant was convicted by the Resident Magistrate at Kehancha of grievous harm contrary to *section 234 of the Penal Code* and sentenced to serve 5 years in jail. The particulars of the charge were that on 18/2/2008 at ihore village in Kuria District within Nyanza Province he unlawfully caused grievous harm to R. A.M (PW1), by tying and cutting the scrotum and removing one testicle. She was not satisfied with the conviction and sentence and therefore preferred this appeal.

The appellant was convicted on the evidence of PW1, PW2 John Langat who is District Children's Officer Kehancha, and Police Constable Francis Kiyalo (PW3) of Kehancha police station. Their evidence was that PW1, aged 10, was staying with the appellant, an adult lady. The appellant took him away from his witchdoctor father in Tanzania sometimes back. She made him do all kinds of work for her and would beat her and demand that he sleeps with her. On this day she cut him on his private part with scissors. He met one Stephen and told him he had been cut by the appellant. Stephen forced the appellant to take the child to Hospital where the appellant said that the child had fallen from a tree. The Doctor sought to talk to PW1 alone. PW1 reported the appellant had cut him. The matter was reported to PW2 and then to PW3. The appellant was arrested and charged. PW3 produced P3 (Exhibit 2) which showed PW1 had a cut wound on the right aspect of the scrotum, but testis were intact. He then had a circumferential cut wound of the roof of the penis. He had suffered grievous harm.

The appellant made unsworn defence and called her daughter Sabina Mokami (DW2) as a witness. The defence evidence was that the appellant was not at home when PW1 was injured, but DW2 was. DW2 testified that PW1 came to her saying he had been injured on the finger. Next day DW2 noticed he was walking with difficulties and could not say what was wrong. DW2 examined him by force and saw injuries on his private part. PW1 said he had fallen from a tree where he had gone to pick fruits. The defence case was that the appellant had been framed by Stephen with whom she had a boundary dispute.

The trial court accepted the prosecution version and did not believe the defence. The appellant's complaint is that the court placed undue reliance on the prosecution evidence as against hers; that the prosecution had not proved the charge against her beyond doubt. When she was prosecuting the appeal she wondered why Stephen, a material witness, with whom she had a land dispute was not called to

testify. Mr. Kemo for the state supported the conviction and sentence.

The court, in accepting the evidence of PW1, found him eloquent and consistent. The witness, however, gave his testimony while not sworn or affirmed. This was because of his age. The court unprocedurally asked the appellant to cross examine him. She indicated she had no question of him. This was held against her in the judgment. Evidence that was given by a child who is not sworn or affirmed is not supposed to be cross examined. Secondly, the court ought to have been careful and cautious about such evidence and asked for corroboration. The record does not show any caution, but the court found corroboration in the P3 which Pw3 produced. However, the P3 was unprocedurally produced in evidence. It was made by a Doctor at Kuria District Hospital who was not called to produce it. There was no explanation why he could not be available. Under *section 77 of the Evidence Act (Cap.80)* the police officer could only have produced the P3 after explanation why the Doctor was not available and after the appellant had been asked, and had indicated, she did not wish to cross examine him. When the appellant denied the charge, she denied all the ingredients of the offence. The fact of injury, or that it amounted to harm, was to be proved beyond doubt. In short, therefore, the prosecution did not produce medical evidence and there was nothing to corroborate the story of PW1.

Stephen was the person who first met PW1 injured and decided to refer him for medical treatment. What did PW1 tell him? The clinical officer or doctor who first treated PW1 and decided to refer the matter to PW2 did not testify. What did PW1 tell him about the injury and its cause? These were material witnesses who were not called, without explanation. The presumption is that had they been called they would have given evidence adverse to the prosecution.

Further, the defence allegation that Stephen and the appellant had a land dispute which had caused the former to frame her had not received sufficient attention by the trial court.

In short, my evaluation of the recorded evidence shows the prosecution did not prove the guilt of the appellant beyond doubt.

The result is that the appeal against conviction succeeds, and, with it, the appeal against sentence. The conviction is quashed and the sentence set aside. The appellant is ordered to be set at liberty forthwith unless he is otherwise legally held.

Dated, signed and delivered at Kisii this 24th Day of November, 2009.

A.O.MUCHELULE

JUDGE

24/11/2009

Before A.O.Muchelule-Judge

Court clerk-Mongare

Mr. Mutai for the State

Appellant –present

Court: Judgment in open court.

A.O.MUCHELULE

JUDGE

24/11/2009